

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 833 OF 2018

BETWEEN

OBADIA MWAMBAPA.....APPLICANT

AND

PIUS SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

Date of Last Order: 25/09/2020

Date of Judgment: 20/11/2020

A. E. MWIPOPO, J

OBADIA MWAMBAPA, the Applicant herein, has filed the present application for revision against the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/TEM/149/2017/120/2017 delivered on 19th October, 2018. The Applicant who was employed by the Respondent namely Pius Secondary School on 9th March, 2016 for two years fixed contract was terminated for misconduct on 2nd March, 2017. Aggrieved by the employer's decision, the

Applicant referred the dispute to the Commission for Mediation and Arbitration where the matter was heard and the Commission decided in his favour. The Commission awarded the Applicant a total of shillings 1,188,462/= being monthly salary compensation for the remaining period of his fixed term contract. The Applicant was not satisfied with the Commission Award and filed the present application.

The Applicant instituted the application by filing Notice of Application accompanied by Chamber Summons and supporting Affidavit. The Applicant main ground of revision is that the Arbitrator erred to award him salary compensation for the remaining period of contract while there is evidence to for the Commission to award general damages to the Applicant for the mental torture and injuries. The Applicant further alleged that the Arbitrator erred to calculate Applicant's compensation on the basis of shillings 100,000/= while the evidence available proved that the Applicant remuneration was more than the said amount.

The Applicant is praying to the Court for the following orders:-

1. That, the Court be pleased to call and examine the records of the respective Labour Dispute.

2. That, the Court be pleased to make an order that the Applicant's to be re-instated to his former employment without loss of employment rights due to breach of contract or the Applicant be paid all employment rights as from the date of the breach of the fixed term contract to the date of final payment and no less than thirteen months' remuneration with compensation for the remaining period of the contract.
3. Any other relief that this Court may deem fit to grant.

In this application, both parties to the application were represented. Mr. Michael Deogratious Mgombozi, Personal Representative, appeared for the Applicant, whereas, the respondent was represented by Mr. Peter Nyangi, Advocate. The hearing of the application proceeded by way of written submission following the Court Order.

Submitting in support of the application, Mr. Michael Mgombozi argued that the trial Arbitrator failed to evaluate the Applicant's evidence in terms of the remuneration. The Applicant testified that his remuneration was shillings 3,200,000/= per month thus calculation of Applicant compensation was supposed to be based on the said remuneration. The Respondent failed to provide evidence to prove that Applicant was paid shillings 100,000/= as

monthly salary. The Respondent was supposed to tender salary slips and payroll to prove the Applicant's salary. The Respondent tendered a payroll for one month only which shows that the Applicant was paid shillings 100,000/= as basic salary, 520,000/= as meal allowance, 520,000/= as bus fare, 520, 000/= as teaching allowance, 520,000/= as house allowance, 520,000/= as reams class making the gross payment of Applicant monthly remuneration to the sum of 2,700,000/=. Thus, the Arbitrator was supposed to order payment of compensation of for 11 months' basing on monthly salary of shillings 2,700,000/= and not otherwise. According to the law the employee's compensation is based on wages and not basic salary.

The Applicant submitted further that the Applicant has signed the contract of employment but the Respondent did not avail him with the copy of the same. The copy of the contract tendered by the Respondent was not the copy which was signed by the Applicant. The Applicant disputed the amount of salary which was found in the respective contract. The Respondent terminated the Applicant's employment contract without a notice which is contrary to the law and the terms of contract. Also, the procedure for termination was not adhered as the Applicant was not given

right to be heard. For that reason, the Applicant prayed for the Court to allow the application.

The Respondent Counsel strongly opposed the Applicant's submission. He argued that the trial Arbitrator was not erred in law to grant the Applicant payment of shillings 1,188,462/= being compensation for the remaining period of the fixed term contract. The evidence available from Stephano Allen Haruna - DW1 shows that the Applicant basic salary was shillings 100,000/= per month as per contract of employment – Exhibit PSS1. The Applicant failed to prove that his salary was shillings 3,200,000/= as he alleges. The Respondent tendered payment roll – Exhibit PSS7 which shows that the Applicant receiving basic salary and allowances payable to him which overall amounted to shillings 3,200,000/=. However, the calculation for the compensation to be awarded to the Applicant lawfully based on the basic salary which was shillings 100,000/=. The allowances are only payable to employee while working with the employer. The Arbitrator was not bound to grant payment not agreed by the parties in their contract.

Regarding the Applicant's allegation that the contract of employment tendered was not the one he signed, the Respondent submitted that this was a new ground for revision which was not part of the Affidavit. The

Applicant failed to prove that there is another contract of employment which was signed by the parties.

It was submitted by the Respondent that it is discretion of the Commission to grant general damages to the Applicant which is judiciously. The Commission needed evidence to prove existence of loss or injury suffered by the Applicant for the act of the Respondent. Thus, the Arbitrator was right for not granting the general damages to the Applicant. The Respondent prayed for the application to be dismissed.

The Court asked the parties to address the Court on the salary amount appearing in the contract to be less than the minimum wages provided by the law. The Applicant was of the view that the salary of shillings 100,000/= was below the minimum wages provided by the law as a result the employment contract was illegal. The Respondent was of the view that the parties agreed in the contract for the salary to be shillings 100,000/=. As result the parties to the contract are bound by the terms of the contract. The Applicant never complained about the salary before. Further, the Respondent submitted that as the issue of lawful minimum wages was never raised before Commission and there is no evidence on the issue, then this Court is not in position to determine it. To support the position the

Respondent cited the case of **Raphael Enea Mngazija vs. Abdallah Kalonjo Juma**, Civil Appeal No. 240 of 2018, Court of Appeal of Tanzania, at Tanga, (Unreported).

From the submissions, there is no dispute that the Applicant was unfairly terminated by the Respondent as it was held by the trial Arbitrator. The respondent did not challenge the Commission Award at all and the Applicant is challenging the amount of money awarded to him. This means that the only issue in dispute before the Court is whether the remedies awarded to the Applicant by the Commission was proper in accordance with the law.

The Applicant submitted that he was supposed to paid by the Respondent for notice payment, general damages for the injuries, and compensation for 11 months' remaining in his contract of employment basing on the monthly remuneration of shillings 2,700,000/=. The Respondent was of the view that the Commission Award was proper in accordance with the law.

The evidence available shows that after the Commission found that the termination of Applicant's employment contract was not fair, the Arbitrator awarded the Applicant compensation of shillings 1,188,462/= being

compensation for the remaining period of the fixed term contract which was 11 months and 23 days. The basis of the calculation was Applicant's basic salary which according to Exhibit PSS1 was shilling 100,000/= per month. The Arbitrator did not award general damages for the reason that there is no evidence to prove the injuries sustained by the Applicant from the Respondent's acts.

I agree with the Arbitrator that the evidence available in the record especially the contract of employment – PSS1 shows that the Applicant salary is shillings 100,000/= and also the contract shows that Applicant will be paid allowances. This evidence is supported by testimony of DW1 and Exhibit PSS7 – the payroll for January and February, 2017, which shows that the Applicant was paid for each month shillings 100,000/= as basic salary, shillings 520,000/= teaching allowance, shillings 520,000/= as bus fare, shillings 520,000/= as meal allowance, shillings 520,000/= as house allowance and shillings 520,000/= as reams class making the total amount paid to the Applicant for each month to be shillings 2,700,000/=. The Applicant argued that his salary was shillings 3,200,000/= but there is no evidence to support his testimony. Also there is no proof that there was another contract of employment which was signed between the parties as it

was alleged by the Applicant. In the contrary, testimony Of DW1, Exhibit PSS1 and PSS7 support Respondent's argument. Therefore, the Arbitrator rightly held that the Applicant basic salary was shillings 100,000/=.

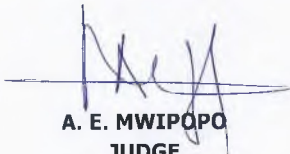
Further, the Arbitrator rightly awarded the Applicant compensation relying on the decision of this Court in the case of **Good Samaritan vs. Joseph Robert Savari Munthu**, Revision No. 165 of 2011. It is a trite that where probable consequence of employer's action to terminate employee unlawfully is the loss of employee's salary for the remaining period of the unexpired term, the employer is supposed to compensate the employee for the loss. This is a direct, foreseeable and reasonable consequence of the employee's action.

The Applicant argued that the salary of shillings 100,000/= was below legal minimum wage which is true. But, as submitted by the Respondent the issue of minimum wages was never raised before the Commission for the parties herein to give evidence on it. As a result, there is no evidence available for the Court to be in position to determine the issue. Thus, I find that the Court hands are tied from determining the issue as it was held in the case of **Raphael Enea Mngazija vs. Abdallah Kalonjo Juma**, (supra).

Regarding the payment of notice of termination, the termination letter – Exhibit PSS13 listed Applicant's terminal benefits which includes one month's salary in lieu of notice, annual leave, severance package and one day pay. DW1 testified that the Applicant was paid terminal benefits of shillings 6,120,000/= as per Exhibit PSS7. The Applicant in his testimony stated that he was paid shillings 6,400,000/= as terminal benefits. Thus, I find that this evidence prove that terminal benefits were paid to the Applicant although the detailed calculation of each benefit paid was not provided. In addition there is no evidence in record to prove that notice payment was not paid to the Applicant.

Regarding the general damages, the Arbitrator decided not to award the general damages on the ground that there is no evidence to prove the injuries to the Applicant. The Respondent supported the Arbitrator's position. The Applicant was of the view that he was tortured mentally and his reputation was injured. Reading the testimony of the Applicant, he stated that the Respondent tortured and humiliated him. He was left with no income for all the time and the other teachers who are subordinate to him were told that the Applicant has made the students fail. The Applicant testified that even the disciplinary committee was composed of teachers whom he was

supervising. This evidence was not dispute before the Commission. I'm of the opinion that this evidence is sufficient to prove that the Applicant suffered humiliation before his subordinates by the accusation that he made the students fails to his subordinates. Therefore, in the special circumstances of this case I hereby award the Applicant to be paid by Respondent general damages to the tune of shillings 10,000,000/= in addition to the compensation of shillings 1,188,462/= awarded by the Commission. The CMA award is set aside to the extent discussed herein. Each party to bear its own cost of the suit.



A. E. MWIPOPO
JUDGE
20/11/2020